Supreme Court, U.S.
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No. ____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1995

WAYNE SCOTT, DIRECTOR,
TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION
Petitioner,

v.

SANDY E. SHERMAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether a certificate of probable cause to appeal issued to a habeas corpus petitioner under 28 U.S.C. § 2253 may be limited to certain issues.

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PETITION FOR WRIT OF CERTIORARI
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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Wayne Scott, Director, Texas Department of Criminal Justice, Institutional Division, and files this Petition for Writ of Certiorari.[1]

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[1] For clarity, Petitioner will be referred to as "the Director" and Respondent as "Sherman."

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the district court's denial of habeas corpus relief, reported as *Sherman v. Scott*, 62 F.3d 136 (5th Cir. 1995), is attached hereto as Appendix A. The memorandum and order of the federal district court dated December 13, 1994, granting a limited certificate of probable cause to appeal (CPC) is attached as Appendix B. The memorandum and order of the federal district court dated November 8, 1994, denying habeas corpus relief is attached as Appendix C.

JURISDICTION

This petition for writ of certiorari is filed within ninety days after the court below issued its opinion on August 30, 1995. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 28 U.S.C. § 2253 provides, in pertinent part, as follows:

> An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

STATEMENT OF THE CASE

A. State Court Proceedings

Sherman is in the Director's custody pursuant to a judgment and sentence of the 232nd Judicial District Court of

Harris County, Texas, in Cause No. 533037. Tr 54. Sherman was charged with the felony offense of delivery of a controlled substance. She pled not guilty and was tried by a jury, which on July 20, 1990, found her guilty and assessed punishment of imprisonment for sixty years.

The judgment was affirmed by the First Court of Appeals of Texas in an unpublished opinion filed on September 26, 1991. *Sherman v. State*, No. 01-90-00689-CR. Sherman did not file a petition for discretionary review by the Texas Court of Criminal Appeals. She has filed one state application for writ of habeas corpus challenging this conviction; it was denied by the Court of Criminal Appeals on September 8, 1993. *Ex parte Sherman*, No. 24,698-01.

B. Federal District Court Proceedings

Sherman then filed a federal petition for writ of habeas corpus in which she raised the following claims: (1) the statute pursuant to which she was convicted is unconstitutional, (2) the evidence is insufficient to sustain the conviction, (3) she was denied her right of confrontation because she was not allowed to cross-examine the chemist who tested the drugs, (4) her trial was rendered unfair by the admission in evidence of a photocopy of money used in the drug transaction, (5) trial counsel was ineffective, and (6) appellate counsel was ineffective. After the Director moved to dismiss the petition for failure to exhaust state remedies, Sherman withdrew her first ground, and the Director moved for summary judgment. The district court then reviewed the pleadings and the state court records, found that Sherman's claims had no merit, and dismissed the petition with prejudice. App. C.

After Sherman filed a notice of appeal, the district court entered a memorandum and order in which it considered, *inter alia*, whether Sherman was entitled to a certificate of probable cause to appeal (CPC), *i.e.*, whether her claims were "debatable among jurists of reason." App. B-3, citing *Barefoot v. Estelle*,

463 U.S. 880, 892-93 (1983). Finding that "the bulk of Sherman's claims do not meet this standard," the court granted a CPC limited to the confrontation claim. *Id.* at 4.

C. Court of Appeals Proceedings

On appeal, Sherman contended that the court of appeals "has jurisdiction over all of his [sic][2] claims because a CPC may not be limited to a single issue." App. A 2. The court below accepted this contention, holding that "a grant of CPC gives this court jurisdiction over the entire judgment entered by the district court disposing of all the claims asserted by the petitioner in the district court." App. A 6.

The court of appeals gave three reasons for holding that a district court may not issue a limited CPC: (1) issuance of a limited CPC "'is inconsistent with the general rule that appeals lie from final judgments or orders, not from determinations of legal issues,'" App. A 4, quoting *Van Pilon v. Reed*, 799 F.2d 1332, 1335 (9th Cir. 1986); (2) "'[t]o the extent that limited certificates of probable cause represent an effort to eliminate frivolous issues from consideration on appeal, they have little practical effect,'" *id.* at 5, quoting *Van Pilon*, 799 F.2d at 1336; and (3) "allowing limited CPCs would allow 'a single district judge, a single circuit judge, or even a panel of the Court of Appeals to prescribe the issues which another panel may consider in support of, or in opposition to, a judgment.'" *Id.*, quoting *United States ex rel. Hickey v. Jeffes*, 571 F.2d 762, 766 (3d Cir. 1978).

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[2] Throughout the federal proceedings, the Director, the district court and the Fifth Circuit have referred to Sherman as being male. In fact, she is not.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE COURTS OF APPEALS.

As noted by the court below, its holding that a CPC may not be limited to certain issues is consistent with the law of the Third, Sixth, Seventh and Ninth Circuits, App. A 6, and is in conflict with the law of the Second Circuit as explicated in *Vicaretti v. Henderson*, 645 F.2d 100, 101 (2d Cir. 1980), *cert. denied*, 454 U.S. 868 (1981). App. A. 4 n. 1. In addition, without discussing the issue, the First Circuit has issued a limited CPC, thus demonstrating its belief in its authority to do so. *Nelson v. Moore*, 470 F.2d 1192, 1193 n. 1 (1st Cir. 1972), *cert. denied*, 412 U.S. 951 (1973).

It is axiomatic that a square and irreconcilable conflict among the circuits is a compelling basis for exercise of the Court's certiorari jurisdiction. *E.g., McElroy v. United States*, 455 U.S. 642, 643 (1982). The conflict presented here is neither illusory nor reconcilable. Moreover, it involves an issue that should be conclusively resolved.

> [T]he question as to the legal effect of the attempt by the district court to limit its certificate to specific issues is, we recognize, less than momentous; this is a prime example of a situation in which it may not be of great importance what the law is but it is important that the law be clear.

Houston v. Mintzes, 722 F.2d 290, 292 (6th Cir. 1983). Certiorari should be granted to decide this issue of federal habeas corpus practice, thus promoting uniformity among the circuits.

II. A HABEAS PETITIONER'S APPEAL MAY BE LIMITED TO CERTAIN ISSUES.

The court below offered three bases for its holding. App. A 4-5. It is the Director's submission that the first rationale is legally unsound, the second rationale is largely irrelevant, and the second and third rationales are internally inconsistent.

The Fifth Circuit first found support for its holding in the general rule that appeals lie from judgments or orders and not from the determination of legal issues. This reasoning proves too much, however, as every appeal from a judgment or order necessarily involves consideration of the underlying issues of law. Moreover, on certiorari review, this Court reviews judgments, not legal issues. *E.g.*, 28 U.S.C. § 1257(a) ("Final judgments or decrees rendered by the highest court of a State . . . may be reviewed by writ of certiorari"); *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956) ("This Court . . . reviews judgments, not statements in opinions"). Nonetheless, the Court frequently limits its granting of a petition for writ of certiorari to particular questions presented in the petition. *E.g.*, *Pacific Gas & Electric Co. v. State Energy Resources Commission*, 457 U.S. 1132 (1982); *Blum v. Yaretsky*, 454 U.S. 815 (1981). That the courts of appeals sit to review judgments of the district courts, rather than legal issues, should not compel the conclusion that appellate review must be either denied or granted as to all issues presented.

The second rationale offered by the court below--that limited grants of CPCs will not effectively curb frivolous appeals because petitioners will continue to raise and obtain review of issues on which CPC has not been granted--does not support its holding. It well may be that the Fifth Circuit is correct in this regard, in which case the wisdom or efficacy of limited CPCs might be called into question. That this is so does not undermine the authority of a district court (or a judge of a court

of appeals) to issue limited CPCs, however. Both the federal district courts and the courts of appeals have discretion to grant or deny a CPC. The power to deny altogether logically subsumes the power to grant in part and deny in part. The court below erred in measuring the extent of judicial authority against its own benchmark as to how efficaciously that authority might be exercised.

Further, this reasoning is at odds with the third rationale of the opinion of the court below: that limited CPCs constitute an improper limitation on the scope of appellate review. If, on the one hand, limited CPCs will not curb frivolous appeals because petitioners will continue to obtain review of issues on which a CPC was not granted, then it cannot reasonably be said that they will impinge on the courts of appeals' authority to decide those issues.

Moreover, as a practical matter, the Fifth Circuit's concerns appear unfounded. Just as a court of appeals re-examines the issues presented to determine whether to grant a CPC after it has been denied by the district court, so, too, it may re-examine those issues that were not included in the grant of a limited CPC. *See Vicaretti v. Henderson*, 645 F.2d at 102 ("In this case, we find no compelling reason to broaden the scope of review beyond the one issue specified when the prior panel issued a certificate of probable cause"). Thus, the grant of a limited CPC no more limits a court of appeals' jurisdiction than does a district court's complete denial of a CPC. In either case, the court of appeals is the final arbiter as to which issues it will consider on appeal. *Vicaretti, id.* ("the limitation is normally to be respected by the panel that considers the merits of the appeal, but the panel would always have authority to broaden the scope of the appeal").

It is noteworthy that the court below observed that "the effort of the district court to highlight the only issue that it considered debatable is laudable . . . . " App. A 4. That this effort was properly directed is evident from the Fifth Circuit's

opinion. Although the court found that it had jurisdiction over the entire judgment of the district court, it disposed of the remainder of Sherman's claims in a single sentence. App. A 13. The court of appeals' summary disposition of these claims underscores the correctness of the district court's decision that they not be included in the grant of a CPC.

Thus, the holding of the court below disserves the primary function of the Great Writ: to uncover and correct violations of the United States Constitution. Where, as here, a petitioner's claims are patently meritless, no societal interest is advanced by mandating that they be considered on appeal. "The procedures adopted to facilitate the orderly consideration and disposition of habeas petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution these procedures make toward uncovering constitutional error." *Barefoot v. Estelle*, 463 U.S. at 887-88. Review should be granted to correct the judgment of the Fifth Circuit.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the writ of certiorari to the Court of Appeals for the Fifth Circuit issue.

Respectfully submitted,

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APPENDIX A

SANDY E. SHERMAN, Respondent-Appellant
v.
WAYNE SCOTT, Director, Texas Department of Criminal Justice, Institutional Division, Respondent-Appellee.

No. 94-20907.

United States Court of Appeals,
Fifth Circuit.

Aug. 30, 1995.

Sandy Sherman, Huntsville, TX, pro se.

Amy Holley Hennessee, Asst. Atty. Gen., Dan Morales, Atty. Gen., Austin, TX, for appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before KING, HIGGINBOTHAM and PARKER, Circuit Judges.

KING, Circuit Judge:

*1 Sandy Sherman was convicted in Texas state court for delivery of a controlled substance and was sentenced to sixty years of imprisonment. After the Texas Court of Appeals affirmed his conviction, Sherman did not seek review in the Texas Court of Criminal Appeals. Instead, Sherman filed a state application for habeas relief which was denied by the Texas Court of Criminal Appeals. Sherman then sought habeas relief in federal district court, but the district court dismissed his petition with prejudice. Sherman filed a notice of appeal and sought a certificate of probable cause and appointment of counsel. The district court denied Sherman's request for

counsel and granted a CPC on only one issue. Sherman, proceeding pro se, now appeals, arguing, inter alia, that this court has jurisdiction over all of his claims because a CPC may not be limited to a single issue. While we agree that the issuance of a CPC on any issues gives us jurisdiction over the appeal from the entire judgment entered by the district court, we nevertheless find that Sherman's claims are without merit, and we affirm the district court's dismissal of his petition.

I.

BACKGROUND

In his federal habeas petition, Sherman argued that: (1) insufficient evidence to sustain his conviction was presented; (2) testimony from a chemist whom he was not allowed to cross-examine was admitted in violation of the confrontation clause; (3) a photocopy of money used in the drug transaction was improperly admitted into evidence; and (4) effective assistance of counsel at trial and on appeal was denied. The respondent moved for summary judgment. The district court, after carefully and thoroughly examining Sherman's claims, found that Sherman "ha[d] failed to demonstrate that Texas is holding him in custody in violation of the Constitution or a law or treaty of the United States" and granted the respondent's motion for summary judgment. Accordingly, the district court entered a final judgment, dismissing Sherman's petition with prejudice.

Sherman then filed a notice of appeal along with an application for a CPC. The district court determined that only Sherman's claim "concerning the admission of a laboratory tests report without the testimony of the policy chemists who performed the tests" merited further review. Thus, the district court granted Sherman's motion "to the extent that it seeks a certificate of probable cause to appeal [the district] court's conclusion that Sherman's conviction was obtained at the expense of his right to confront the chemists who performed the tests identifying a controlled substance."

Sherman appeals, reasserting the constitutional claims he raised in the district court. Additionally, Sherman contends that his right to appeal was impinged because the district court limited its grant of the CPC to one issue.

II.

DISCUSSION

A. Scope of the CPC

The law governing habeas procedure provides that:

> An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention arises out of the process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

*2 28 U.S.C. § 2253; see also *Drew v. Scott*, 28 F.3d 460, 462 (5th Cir.) (noting that "[w]e have no jurisdiction to address the merits of [an] appeal from the district court's denial of habeas relief unless we grant a CPC"), cert. denied, ___ U.S. ___, 115 S.Ct. 5, 129 L.Ed.2d 906 (1994). Additionally, the Supreme Court has noted that a CPC "requires [a] petitioner to make a substantial showing of the denial of [a] federal right." *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394, 77 L.Ed.2d 1090 (1983) (internal quotation omitted) (alteration in original); accord *Jacobs v. Scott*, 31 F.3d 1319, 1323 (5th Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 711, 130 L.Ed.2d 618 (1995). That is, a petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot*, 463 U.S. at 893 n. 4, 103 S.Ct. at 3394 n. 4 (citations

omitted) (internal quotations omitted); accord *Jacobs*, 31 F.3d at 1323.

In the instant case, the district court granted a CPC on only one issue, apparently in an attempt to preclude Sherman from raising his other claims in this appeal. While the effort of the district court to highlight the only issue that it considered debatable is laudable, the partial grant of CPC was improper to the extent that it was designed to limit the jurisdiction of this court to that issue. The language of § 2253 gives courts of appeal jurisdiction over "the final order in a habeas corpus proceeding" after a CPC is granted. 28 U.S.C. § 2253 (emphasis added). Yet, as the majority of circuit courts addressing this issue have noted, "[n]othing in the language or legislative history of 28 U.S.C. §2253 suggests that Congress intended this provision to permit a judge to limit the issues on appeal." *Van Pilon v. Reed*, 799 F.2d 1332, 1335 (9th Cir. 1986); accord *Smith v. Chrans*, 836 F.2d 1076, 1079 (7th Cir. 1988); *Houston v. Mintzes*, 722 F.2d 290, 293 (6th Cir. 1983); *United States ex rel. Hickey v. Jeffes*, 571 F.2d 762, 765-66 (3d Cir. 1978).[1]

A construction of § 2253 that permitted a CPC that was limited to certain issues to limit the jurisdiction of the court of appeals to those issues is "[in]consistent with the general rule that appeals lie from final judgments or orders, not from determinations of legal issues." *Van Pilon*, 799 F.2d at 1335; accord *Smith*, 836 F.2d at 1079; *Hickey*, 571 F.2d at 765; see also *Houston*, 722 F.2d at 293 (rejecting limited CPCs and

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[1] The Second Circuit alone has reached a different conclusion and allows a CPC to limit the issues to be heard on appeal. That court found that the "absence of explicit authority in § 2253 [was not] dispositive." Vicaretti v. Henderson, 645 F.2d 100, 101 (2d Cir. 1980), cert. denied, 454 U.S. 868, 102 S.Ct. 334, 70 L.Ed.2d 171 (1981). Accordingly, the court allowed a limitation of CPCs, but also allowed a panel "to broaden the scope of the appeal if persuaded that such further consideration would be just under the circumstances." id. at 102; accord Barber v. Scully, 731 F.2d 1073, 1075 (2d Cir. 1984).

noting that petitioners "appeal[] not from issues decided by the district court, but from the final order[s] of the district court").

*3 Additionally, "the purpose of requiring the petitioner to obtain a certificate of probable cause is to screen frivolous appeals." *Smith*, 836 F.2d at 1079. The instant case demonstrates that "[t]o the extent that limited certificates of probable cause represent an effort to eliminate frivolous issues from consideration on appeal, they have little practical effect." *Van Pilon*, 799 F.2d at 1336; accord *Smith*, 836 F.2d at 1079-80 (discussing Van Pilon). As the Van Pilon and Smith courts recognized:

> Because we construe a habeas petitioner's notice of appeal as an application for a certificate of probable cause, those petitioners who are issued limited certificates will nevertheless obtain further consideration of the entire petition by this court. It appears likely that petitioners will also continue to argue the merits of excluded claims in the appeal for which a certificate was granted in the hopes of having those claims considered.

Smith, 836 F.2d at 1079-80; accord *Van Pilon*, 799 F.2d at 1336.

Finally, these courts' construction of the rule is jurisprudentially sound, because allowing limited CPCs would allow "a single district judge, a single circuit judge, or even a panel of the Court of Appeals to prescribe the issues which another panel may consider in support of, or in opposition to, a judgment." *Hickey*, 571 F.2d at 766; accord *Houston*, 722 F.2d at 293. Such a rule might lead to a situation where:

> the application of a settled principle of constitutional law would justify the reversal of a denial of habeas corpus relief, but the pro se applicant in applying for a certificate of probable

> cause did not articulate the settled ground with sufficient clarity. If a limited certificate could preclude consideration of the settled ground, it could force a panel of necessity to decide a novel or unsettled issue of constitutional law unnecessary.

Hickey, 571 F.2d at 766; see also *Houston*, 722 F.2d at 293 (noting this potential problem).

Accordingly, as the Third, Sixth, Seventh, and Ninth Circuits have held, a grant of CPC gives this court jurisdiction over the entire judgment entered by the district court disposing of all the claims asserted by the petitioner in the district court. We are, however, benefitted when district courts identify, as the district court has done here, those issues (if any) that they consider "debatable among jurists of reason."

B. Confrontation Clause Issues

Sherman contends that his Confrontation Clause rights were violated because a drug analysis report was admitted through the testimony of a laboratory supervisor instead of through the testimony of the chemists who prepared the report. We disagree.

*4 The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const., amend. VI. The Supreme Court has noted that:

> [T]he Clause envisions a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the

> stand and the manner in which he gives his testimony whether he is worthy of belief.

Ohio v. Roberts, 448 U.S. 56, 63-64, 100 S.Ct. 2531, 2537-38, 65 L.Ed.2d 597 (1980) internal quotation omitted). The Court, however, has also noted that "competing interests, if closely examined, may warrant dispensing with confrontation at trial." Id. (internal quotation omitted) (citation omitted). Accordingly, the Court repeatedly has found that "[w]hile a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable ... that view [is] unintended and too extreme." *Idaho v. Wright*, 497 U.S. 805, 814, 110 S.Ct. 3139, 3145, 111 L.Ed.2d 638 (1990) (internal quotation omitted). Thus, there can be little doubt that "the [Confrontation] Clause does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause." *Id.* at 813, 110 S.Ct. at 3145.

In interpreting the relationship between the Confrontation Clause and the hearsay rules, the Supreme Court has instructed that:

> when a hearsay declarant is not present for cross-examination at trial, the Confrontation clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Roberts, 448 U.S. at 66, 110 S.Ct. at 2539. In *Roberts*, the Court noted that "[a] demonstration of unavailability ... is not

always required," *id.* at 65 n. 7, 110 S.Ct. at 2538 n. 7, and the Court later clarified that "Roberts stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." *White v. Illinois*, 502 U.S. 346, 354, 112 S.Ct. 736, 741, 116 L.Ed.2d 848 (1992).

*5 Thus, when determining whether an out-of-court statement admitted in a criminal trial violates the confrontation clause, we must examine whether the evidence contains particularized guarantees of trustworthiness. As the Supreme Court has stated, these "particularized guarantees of trustworthiness required for admission under the Confrontation Clause must ... be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." *Wright*, 497 U.S. at 820, 110 S.Ct. at 3149 (internal quotation omitted). Further, *Roberts* and other cases make clear that "statements admitted under a firmly rooted hearsay exception are so trustworthy that adversarial testing would add little to their reliability." *Id.* at 821, 110 S.Ct. at 3149 (internal quotation omitted). As to these other statements, the Supreme Court teaches that "evidence possessing particularized guarantees of trustworthiness must be at least as reliable as evidence admitted under a firmly rooted hearsay exception ... [and] must similarly be so trustworthy that adversarial testing would add little to its reliability." Finally, "[i]f the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule [and the Confrontation Clause] do[] not bar admission of the statement at trial." *Id.* at 820, 110 S.Ct. at 3149.[2]

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[2] The Supreme Court also made clear that the indicia of reliability cannot come from corroboration with other evidence at trial, noting that "[t]o be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." Wright, 497 U.S. at 822, 110 S.Ct. at 3150.

In applying this rule to laboratory reports, other circuit courts have determined that such reports contain the particularized guarantees of trustworthiness to keep them from violating a defendant's rights under the Confrontation Clause. See *Minn v. Kerby*, 30 F.3d 1311 (10th Cir. 1994); *United States v. Baker*, 855 F.2d 1353, 1360 (8th Cir. 1988), cert. denied, 490 U.S. 1069, 109 S. Ct. 2072, 104 L.Ed.2d 636 (1989); *Reardon v. Manson*, 806 F.2d 39 (2d.Cir. 1986), cert. denied, 481 U.S. 1020, 107 S. Ct. 1903, 95 L.Ed.2d 509 (1987). In *Baker*, on a direct appeal, the Eighth circuit determined that "[w]hen made on a routine basis, laboratory analyses of controlled substances are admissible as business records under Federal Rule of Evidence 803(6)."[3] *Baker*, 855 F.2d at 1359. Because the reports were admited as a business record, the Eighth Circuit found that "the district court acted under a firmly rooted exception" to the hearsay rule and therefore did not violate the Confrontation Clause. *Id.* at 1360.

In *Minner*, a habeas petitioner claimed that the admission of a police chemist's notes through the testimony of the chemist's supervisor violated the Confrontation Clause. The *Minner* court rejected this claim, finding that the notes had "sufficient particularized indicia of reliability" to satisfy the Clause. The court found the notes reliable because they "concern[ed] mechanically objective tests and were taken contemporaneously with the performance of the tests." *Minner*,

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[3] The Federal Rules of Evidence provide that certain evidence is "not excluded by the hearsay rule even though the declarant is unavailable as a witness." Fed. R. Evid. 803. Included among such evidence is: A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by ... a person with knowledge, if kept in the court of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or the method or circumstances of preparation indicate lack of trustworthiness. Fed. R. Evid. 803(6).

30 F.3d at 1314-15. The court also found the police chemist's notes trustworthy because the supervisor checked the computations of the chemist, and the results were verified by tests conducted by a second chemist. *Id.* at 1314-15. Additionally, the court noted that the supervisor "testified as to standard lab procedures and testified that [the chemist's] notes indicat[ed] that he followed those procedures in testing the substance at issue." *Id.* Consequently, the Minner court concluded that "[t]he admission of [the chemist's] laboratory notes into evidence was proper under the Confrontation Clause." *Id.*

*6 Finally, in *Reardon*, the Second Circuit found that a chemist's report admitted through the testimony of a supervisor did not violate the Confrontation Clause. *Reardon*, 806 F.2d at 41. Noting that the chemists who prepared the report analyzed thousands of compounds each year and were not likely to independently remember any particular test, the court concluded that "there would have been little potential utility in requiring the State to produce the ... chemists for cross-examination." *Id.* Accordingly, the *Reardon* court found that the evidence possessed sufficient indicia of reliability and did not offend the Confrontation Clause.

This court has not had occasion to address whether a laboratory report admitted through testimony by someone other than the individual who prepared that report violates the Confrontation Clause. Although in the present case the lab report was admitted as a business record, without objection, we need not address whether such reports qualify for a recognized exception to the hearsay rule[4] because we find that the report in

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[4] Rule 803's exceptions to the hearsay rule state that certain public records are not excluded even though the declarant is unavailable. Specifically the Rule allows admission of: "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activity of the office or agency, or (B) matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law

question had the "particularized guarantees of trustworthiness" required by the Confrontation Clause.

Specifically, the laboratory analysis in the instant case was admitted through the testimony of the supervisor of the two chemists who prepared the report. The supervisor testified about his own qualifications and experience as well as the qualifications and experience of the two chemists who performed the tests. Additionally, the supervisor recounted the standard analytical procedures used to determine the composition of unknown substances. Finally, the supervisor testified that the report indicated that the chemists reached their results after performing these tests and following standard testing procedures. There seems little question that these routine procedures, performed and recorded also under standard laboratory procedures, were trustworthy. See *Minner*, 30 F.3d at 1314-15; *Reardon*, 806 F.2d at 41; cf. *United States v. McCormick*, 54 F.3d 214, 223-224 (5th Cir. 1995) (noting, in the context of a parole revocation hearing, that laboratory report, although "not so inherently reliable to be automatically admissible in any revocation hearing," was shown by the chain of custody, step-by-step testing processes, and quality control procedures to be reliable).

Furthermore, like the majority of other circuits that have addressed this issue, we fail to see what benefit Sherman would have gained by cross-examining the chemists who prepared the report. As several courts have echoed, "production of the

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enforcement personnel...." Fed.R.Evid. 803(8) (emphasis added). Additionally the Rule provides that: A statement not specifically covered by any of the ... exceptions but having equivalent guarantees of trustworthiness, [are admissible even if the declarant is unavailable], if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of the [ ] rules and the interests of justice will be served by admission of the statement into evidence. Fed. R. Evid. 803(24).

chemist who performed the test 'rarely leads to any admissions helpful to the party.'" *Reardon*, 806 F.2d at 42 (quoting *United States v. Bell*, 785 F.2d 640, 643 (8th Cir. 1986); accord *Minner*, 30 F.3d at 1315; cf. *McCormick*, 54 F.3d at 224 (in parole revocation case, commenting that "[w]e cannot fathom what additional, enlightening information the district court could have gleaned had [the parolee] been permitted to cross-examine the laboratory technicians"). Because the testimony of the supervisor demonstrated that the report had particularized guarantees of trustworthiness and because cross-examination of the chemists who prepared the report would have been of little use to Sherman, we find that the admission of the report did not violate the Confrontation Clause.[5] See *Wright*, 497 U.S. at 820, 110 S. Ct. at 3149 ("If the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule [and the Confrontation Clause] do [ ] not bar admission of the statement at trial.").[6]

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[5] The Second Circuit's decision in *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977), concerned the admissibility of a laboratory report under the Federal Rules of Evidence, an issue that we do not reach in this case. Our conclusion is based on Confrontation Clause analysis set out by the Supreme Court; that is, the particularized guarantees of trustworthiness found in the report and the fact that cross-examination of the chemists would have been of little utility. See *Reardon*, 806 F.2d at 42 ("Oates was not decided on constitutional grounds but on an interpretation of the Federal Rules of Evidence...").

[6] We are further persuaded that habeas relief is not proper on this issue because even if the laboratory report lacked the "particularized guarantees if trustworthiness" required by the Constitution, any error stemming from admission of the report was harmless. We have stated that "[t]he erroneous admission of prejudicial testimony justifies habeas corpus relief only when it is material in the sense of [being a] crucial, critical, highly significant factor." *Andrade v. McCotter*, 805 F.2d 1190, 1193 (5th Cir. 1986) (internal quotations omitted) (second alteration in original); see also *Delaware v. Van Arsdall*, 475 U.S. 673, 679-84, 106 S. Ct. 1431, 1435-38, 89 L.Ed.2d 674 (1986) (noting that "Confrontation Clause errors [are] subject to ... harmless error analysis"). Additionally, the Supreme Court has stated that: Whether such an [evidentiary] error is harmless in a particular case depends upon a host of factors, all readily accessible to

C. Other Claims

*7 Sherman makes several additional claims, all of which we have considered and find to be without merit.

III.

CONCLUSION

For the foregoing reasons, we AFFIRM the district's denial of Sherman's application for habeas relief.

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reviewing courts. These factors include the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. *Van Arsdall*, 475 U.S. at 684, 106 S. Ct. at 1438; accord *Cupit v. Whitley*, 28 F.3d 532, 536-47 (5th Cir. 1994), cert. denied, __ U.S. ___, 115 S. Ct. 1128, 130 L.Ed.2d 1091 (1995); *Johnson v. Blackburn*, 778 F.2d 1044, 1051 (5th Cir. 1985). In the instant case, the laboratory report was not the only evidence that the material in question was cocaine. An undercover police officer testified that he purchased a substance that all parties to the transaction treated as cocaine. Additionally, that officer testified that a field test of the substance also indicated that it contained cocaine. Accordingly, because the evidence of the laboratory report was cumulative, it was not material in the sense of being a crucial, critical, highly significant factor; thus, even if the admission of the laboratory report had violated the Confrontation Clause, which it did not, it would not warrant habeas relief.

APPENDIX B

SANDY E. SHERMAN, Petitioner
v. No. H-94-0043
JAMES A. COLLINS, Respondent

MEMORANDUM AND ORDER

Pending before the court is the Motion for the Clerk to Produce Missing Documents (Docket Entry No. 20) of petitioner, Sandy E. Sherman. Sherman complains that he never received several items that the clerk should have supplied to him when complying with the court's September 26, 1994, Memorandum and Order partially granting his motion for production of documents. (Docket Entry No. 16) The clerk was ordered to provide Sherman with copies of Sherman's state trial court records that were in the clerk's file in this case. Sherman now complains that he never received a number of individual pages and specified items from those records. A thorough review of the state court records originally submitted by respondent reveals that a number of those items have not been provided to the clerk. Accordingly, respondent is **ORDERED** to furnish both the clerk and Sherman copies of the following: Trial transcript pages I SF 69, 80, 86, 94, 123, 128, 130, 135, and the State's appellee brief in Sherman v. State, No. 01-90-00689-CR (Tex. Ct. App.--Houston [1st Dist.] 1991). Because the following items are already in the clerk's possession, the clerk is **ORDERED** to furnish petitioner copies of the following: Trial transcript pages **I SF** 56-60 and **II SF** 236-37.

In footnote 8 of its November 8, 1994, Memorandum and Order (Docket Entry No. 18) the court noted that respondent had failed initially to provide a copy of Sherman's state habeas corpus records to the clerk, and that when respondent corrected that omission he failed to supply a copy of those records to Sherman. To avoid further unnecessary delay, the court ordered the clerk to fulfill Sherman's request for a copy of that document instead. Sherman complains that he

never received a copy of those records from the clerk. Accordingly, the clerk is **ORDERED** to furnish a copy of Sherman's state habeas corpus records as well.

The balance of Sherman's motion requests documents that are not contained in his state court records, and are probably not in the possession of the respondent. All of these documents fall within the scope of the court's November 8, 1994, denial of Sherman's request for production of items not already supplied in compliance with the court's September 26, 1994 Order.[1] Because the court never ordered the clerk to provide Sherman with these items, they were not missing from the materials that were furnished pursuant to an order of the court. Accordingly, Sherman's motion for an order compelling the clerk to furnish those items is **DENIED**.

Also pending is Sherman's Motion for Certificate of Probable Cause and Appointment of Counsel (docket Entry No. 22). A state prisoner may not proceed with an appeal from the denial of a petition seeking a writ of habeas corpus without first obtaining a certificate of probable cause from the district judge who denied the petition or a circuit justice or judge. 28 U.S.C. § 2253; Fed. R. App. P. 22(b). "A certificate of probable cause requires petitioner to make a 'substantial showing of the denial of [a] federal right.'" *Barefoot v. Estelle*, 103 S. Ct. 3383, 3394 (1983) (citation omitted). To satisfy this requirement,

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[1] [Memorandum and Order (Docket Entry No. 18), at 4 n.2 & 22-23] Sherman's state court records do not contain copies of property room receipts for the amount of money he possessed when booked, exhibits introduced at his trial, or a written result of a motion for instructed verdict. Neither is there a copy of any written plea offers. Although these items may exist, because the court concluded that they are not relevant to consideration of his claims for habeas relief, the court denied petitioner's request for leave to pursue discovery to obtain them.

> petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further."

Id. at 3394 n.4 (emphasis in the original) (internal quotations and citations omitted). The bulk of Sherman's claims do not meet this standard. However, his claim concerning the admission of a laboratory test report without the testimony of the police chemists who performed the tests raises a confrontation clause issue that has not yet been addressed directly by the Fifth Circuit and that has met with divided results in other courts. The court is therefore persuaded that Sherman is entitled to a certificate of probable cause to pursue an appeal of this court's decision to deny relief on the basis of that claim.

Sherman also urges the court to afford appointed counsel to prosecute that appeal. An indigent petitioner seeking habeas corpus relief has no constitutional right to appointed counsel. *Pennsylvania v. Finley*, 107 S. Ct. 1990, 1993 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions and we decline to so hold today." (citation omitted)). Congress, however, has provided discretionary authority to appoint counsel for indigent habeas petitioners,[2] or to "request an attorney to represent any . . . person unable to employ counsel . . . ." 28 U.S.C. § 1915(d), in cases "presenting 'exceptional circumstances.'" *Cooper v. Sheriff, Lubbock County, Texas*, 929 F.2d 1078, 1084 (5th Cir. 1991) (enumerating the factors that are normally evaluated when determining the existence of

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[2] 18 U.S.C. § 3006A(g) ("Any person . . . seeking relief under section 2241, 2254, or 2255 of title 28 may be furnished representation . . . whenever . . . the court determines that the interests of justice so require . . . .").

exceptional circumstances under § 1915(d). The court is persuaded that the interests of justice can be served if Sherman presents his appeal without the assistance of appointed counsel. Of foremost importance in this decision is the existence of a well developed body of case law examining the debate over the precise issues raised by Sherman under circumstances mirroring those that transpired at Sherman's trial. *Cf. Santana v. Chandler*, 961 F.2d 514, 516 (5th Cir. 1992) (concluding that the existence of extensive discussion of the issues presented on appeal by two other circuits rendered it "doubtful that an attorney could provide more than marginal assistance to Santana or to this court."); *Self v. Blackburn*, 751 F.2d 789, 793 (5th Cir. 1985) (denying request for appointed counsel where "supplemental briefing by counsel would not assist the court and would be an inefficient use of judicial resources . . . ."). Another significant factor in the decision not to appoint counsel is the absence of any disputed issues of fact in connection with Sherman's confrontation clause claim. Sherman can therefore present his appeal adequately without the need to further investigate the facts of his case. Accordingly, Sherman's Motion for Certificate of Probable Cause and Appointment of Counsel (Docket Entry No. 22) is GRANTED to the extent that it seeks a certificate of probable cause to appeal this court's conclusion that Sherman's conviction was not obtained at the expense of his right to confront the chemists who performed the tests identifying a controlled substance, and is DENIED as to all other requested relief.

SIGNED at Houston, Texas, on this 13th day of December, 1994.

SIM LAKE
UNITED STATES DISTRICT JUDGE

APPENDIX C

SANDY E. SHERMAN
Petitioner

v. No. H-94-0043

JAMES A. COLLINS,
Respondent

MEMORANDUM AND ORDER

Pending before the court are Respondent, Wayne Scott's, Motion for Summary Judgment (Docket Entry No. 12), and petitioner, Sandy E. Sherman's, Motion for Discovery Subpoena Duces Tecum (Docket Entry No. 4). Petitioner is presently serving a sixty-year sentence pursuant to a judgment finding him guilty of delivery of a controlled substance. *The State of Texas v. Sandy E. Sherman,* Cause No. 53303-232 (232nd Judicial District Court of Harris County, Texas), *Aff'd, Sherman v. State,* No. 01-90-00689-CR (Tex App.--Houston [1st Dist.] September 26, 1991). The Court of Criminal Appeals denied Sherman's application for state writ of habeas corpus without written order. *Ex Parte Sherman,* No. 24,698-01 (Tex. Crim. App. September 8, 1993).

Petitioner argues that he is entitled to federal habeas corpus relief on four grounds: (I) he was convicted on insufficient evidence, (II) he was not allowed to cross-examine the chemist who analyzed drugs allegedly handled by petitioner, (III) a photocopy of money used in the delivery was admitted as evidence, and (IV) he was denied effective assistance of counsel both at trial and on appeal.

I. Sufficiency of Evidence

Petitioner argues that he was convicted on insufficient evidence. The Supreme Court has found that "in a challenge to a state criminal conviction brought under 28 U.S.C. 2254 . . . the applicant is entitled to habeas corpus relief if it is found that

upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 99 S.Ct. 2781, 2791-92 (1979). The issue is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Id.* at 2789. "The court must apply this standard with reference to the substantive elements of the criminal offense as defined by state law." *Isham v. Collins*, 905 F.2d 67, 69 (5th Cir. 1990) (citation omitted).

"[A] person commits [the offense of delivery of a controlled substance] if the person knowingly or intentionally manufactures, delivers, or possesses with intent to manufacture or deliver a controlled substance . . . ." Tex. Health & Safety code Ann. § 481.112(a) (Vernon 1992). At petitioner's trial Houston police officer Donald Lyn DeBlanc testified that he purchased cocaine from three individuals: Robert Hunt, Carl Hughes and petitioner. DeBlanc stated that he gave Hunt a marked $20.00 bill and ordered a quantity o crack cocaine. DeBlanc then testified that he observed Hunt give DeBlanc's money to petitioner, and then watched petitioner exchange the money for two rocks of crack cocaine provided by Hughes. (II Statement of Facts (SF) 22-25) DeBlanc then saw petitioner hand the rocks to Hunt who ultimately delivered them to DeBlanc. *Id.* at 25-26.) Thus, according to DeBlanc, petitioner facilitated the transaction by ferrying the money and the cocaine between Hunt and Hughes. This testimony coupled with proof that the substance petitioner handled was in fact a controlled substance, established all of the elements of the crime against petitioner.

"Credible testimony of one identification witness is sufficient to support a conviction." *United States ex rel. Wandick v. Chrans*, 869 F.2d 1084, 1089 (7th Cir. 1989) (testimony of one witness who saw defendant shoot the victim in the alley below her third-floor apartment window was sufficient); *United States v. Smith*, 563 F.2d 1361, 1363 (9th Cir. 1977),

cert. denied, 98 S.Ct. 747 (1978) ("testimony of one witness [to post office robbery], if solidly believed, is sufficient to prove the identity of the perpetrator of crime,"); *see also, Ticey v. Peters*, 8 F.3d 498, 503 (7th Cir. 1993) (reversing grant of habeas corpus because prior inconsistent statement of recanting rape victim was, by itself, sufficient).[1] "While . . . considerations of due process . . . might prevent convictions where a reliable evidentiary basis is totally lacking." *California v. Green*, 90 S.Ct. 1930, 1938 n.15 (1970) (rejecting the contention that prior inconsistent statements lack a reliable evidentiary basis), officer DeBlanc's testimony does not lack such a basis. Petitioner's contention that DeBlanc was not a credible witness and that he should not have been believed is therefore not a proper subject for habeas review. *Marshall v. Lonberger*, 103 S.Ct. 843, 851 (1983) ("28 U.S.C. § 2254(d), gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.").[2] Moreover, when determining whether there is sufficient evidence to support a conviction, a court "should not substitute [its] view

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[1] Petitioner's reliance on *Coit v. State*, 808 S.W.2d 473 (Tex. Crim. App. 1991), is misplaced. Contrary to petitioner's reading of that case, *Coit* merely stands for the proposition that a motorist's failure to provide proof of liability insurance did not also establish that the motorist had failed to provide "[p]roof of ability to respond in damages for liability on account of accidents . . ." because an uninsured driver could satisfy the statute's requirements. *Id.* at 475. While it is true that the prosecution's evidence consisted solely of the police officer's testimony, the fact that the motorist's inability to provide proof of insurance was established through the testimony of a police officer -- or even through only one witness -- was irrelevant to the court's holding. It was only because the testimony failed to establish an essential element of the offense that the court held that evidence to be insufficient to prove guilt beyond a reasonable doubt.

[2] In light of the conclusion that the credibility of officer DeBlanc is not a proper issue in petitioner's claim that the evidence was insufficient to support the verdict, petitioner's request for discovery of officer DeBlanc's personnel records, copies of police investigative reports, and copies of the police property room's records (Docket Entry No. 4) will be denied because these materials are not "relevant to the subject matter involved in the pending action" and are not "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

of the evidence for that of the factfinder, but [rather should] consider all of the evidence in the light most favorable to the prosecution." *Alexander v. McCotter*, 775 F.2d 595, 598 (5th Cir. 1985). The court concludes that the jury had sufficient evidence to support its finding that petitioner was guilty beyond a reasonable doubt.

II. Right to Cross-Examine Witness

Petitioner next argues that his confrontation rights were violated because the chemical analysis report concluding that the substance purchased by officer DeBlanc was crack cocaine was admitted even though the chemist who prepared it did not testify at his trial. "[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the 'trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" *Dutton v. Evans*, 91 S.Ct. 210, 220 (1970) (citation omitted). To accomplish this mission, the Confrontation Clause restricts the introduction of hearsay evidence in a criminal prosecution.

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Ohio v. Roberts, 100 S.Ct. 2531, 2539 (1980).

Two police chemists, Judy Nihavitz and Claudia Busbey, performed a series of tests on the two rocks officer DeBlanc

purchased from Hunt, Hughes, and petitioner. The results of these tests were entered on a laboratory report. Neither Nihavitz nor Busbey appeared at petitioner's trial. Instead, their supervisor, Robert Bobzean, testified about the report and the results of the tests it contained. Bobzean testified that Nihavitz was unavailable because she was in the hospital (II SF 217), but there is no evidence to indicate why Busbey did not testify. (*Id.* at 226-227.) "A demonstration of unavailability, however, is not always required." *Ohio v. Roberts*, 100 S.Ct. at 2538 n.7. Rather, "*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." *White v. Illinois*, 112 S.Ct. 736, 741 (1992). In light of *White v. Illinois*, and other precedent, the Tenth Circuit recently held that a criminal defendant's confrontation rights were not violated even though the state failed to demonstrate a police chemist's unavailability before introducing his report through the testimony of his police chemist supervisor. *Minner v. Kerby*, 30 F.3d 1311, 1314-15 (10th Cir. 1994). The *Minner* court reasoned that

> the unavailability requirement does not apply in situations where cross examination of the declarant would be of little value to the defense . . . . The [police] chemists test numerous suspected controlled substances. It is unlikely that a chemist would remember any particular piece of evidence he tested. If [the testing chemist] had testified, he likely would have relied on his notes and on his knowledge of standard laboratory procedures in order to testify about the condition of the evidence when he received it and the steps he took in testing it. Furthermore . . . producing a police chemist as a witness rarely leads to any admissions which are helpful to the defense.

Id. at 1315 (citations omitted). It is just as likely in the present case that the two chemists would not remember one laboratory analysis from another and would have been forced to rely upon the report they prepared. Accordingly, cross-examination of Nihavitz and Busbey would have revealed nothing more than the cross-examination of Bobzean. The Confrontation Clause did not require the state to show that both chemists were unavailable.

"The requirement of trustworthiness or reliability is met by a showing that the hearsay evidence (1) fits within a firmly rooted hearsay exception or (2) carries particularized guarantees of trustworthiness." *Minner v. Kerby*, 30 F.3d at 1314. The circuit courts do not agree as to whether a chemist's report is admissible under a hearsay exception.[3] Statements that "do not

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[3] *Compare United States v. Baker*, 855 F.2d 1353, 1359 (8th Cir. 1988), *cert. denied*, 109 S.Ct. 2072 (1989) ("When made on a routine basis, laboratory analyses of controlled substances are admissible as business records under Federal Rule of Evidence 803(6).") *with United States v. Oates*, 560 F.2d 45, 66-68 (2d Cir. 1977) (because government chemists are law enforcement personnel Rule 803(8)(B) prohibits admission of their reports and Rule 803(6) cannot be used to circumvent that prohibition). *See also United States v. Blackburn*, 992 F.2d 666 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 393 (1993) (reports prepared by a private company that conducts tests independently with its own equipment and prepares reports based on those tests, even if at the instance of a governmental agency, is sufficiently trustworthy and admissible under Rule 803(24); *United States v. Wilmer*, 799 F.2d 495, 500 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 1626 (1987) (report made by law enforcement officials not at the scene of the crime and which are routine, nonadversarial matters made in a nonadversarial setting are admissible under Rule 803(8)(B).

Although the Fifth Circuit has not addressed this specific question, two cases examining the scope of Rule 803(8) are instructive. In *United States v. Cain*, 615 F.2d 380, 382 (5th Cir. 1980), the court applied *Oates* and held that Rule 803(8) precludes admission of a federal prison's escape report, even though it might fall within the scope of Rule 803(6). However, in *United States v. Quezada*, 754 F.2d 1190, 1194 (5th Cir. 1985), the court distinguished *Cain*, and held that an immigration deportation form was admissible to prove that the defendant had previously been deported. The *Quezada* court reasoned that "[i]n the case of documents recording routine,

fall within a firmly rooted hearsay exception . . . are 'presumptively unreliable and inadmissible for Confrontation Clause purposes' . . . and 'must be excluded, at least absent a showing of particularized guarantees of trustworthiness.'" *Idaho v. Wright*, 110 S.Ct. 3139, 3148 (1990). The state can overcome the presumption by showing that the chemists' report satisfied the "particularized guarantees of trustworthiness" requirement. In *Idaho v. Wright* the Supreme Court explained

> that 'particularized guarantees of trustworthiness' must be shown from the totality of the circumstances, but . . . the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief. This conclusion derives from the rationale for permitting exceptions to the general rule against hearsay . . . [I]f the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial. . . .
>
> [W]e think that evidence admitted under the [Confrontation Clause's] requirement must similarly be so trustworthy that adversarial testing would add little to its reliability. . . . Thus, unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation

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objective observations, made as part of the everyday function of the preparing official or agency, the factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime are simply not present." *Id.*

> Clause requires exclusion of the out-of-court statement.

Id. at 3148-50.

The *Minner* court concluded that a police chemist's report satisfied this test because

> [t]he notes concern mechanically objective tests . . . and were taken contemporaneously with the performance of the tests. [The chemist's] computations were checked by [the testifying supervisor], and his results were verified by [another testifying chemist's] testing of the substance. . . . [The absent chemist] knew that [his supervisor] would look over his notes and had access to the evidence he was testing. Furthermore, [the supervisor] testified as to standard laboratory procedures and testified that [the] notes indicate [the chemist] followed those procedures in testing the substance at issue . . . .

30 F.3d at 1314-15. The Second Circuit reached the same conclusion in *Reardon v. Manson*, 806 F.2d 39 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1903 (1987). The *Reardon* court stated:

> We conclude that there would have been little potential utility in requiring the State to produce the assisting chemists for cross-examination as to whether they were telling the truth when they informed Dr. Reading that they had tested the substances he gave them and that the results they brought for his inspection were obtained in accordance with his instructions and standard laboratory procedures. In the remote event that one of Dr. Reading's assistants did recall testing the narcotics at issue herein, it would be unrealistic to expect her to admit on cross-

> examination that she was either mistaken or lying when she told Dr. Reading, in effect, "I ran the tests you requested on the substance you gave me minutes ago, and here are the results."

Id. at 41-42. *But see Kettle v. State*, 641 So. 2d 746, 749-50 (Miss. 1994) (concluding that admission of chemist's report over Confrontation Clause challenge was reversible error without conducting detailed analysis of the report's indicia of trustworthiness).

In the present case the chemical analysis was admitted through the testimony of the two chemists' supervisor, Robert Bobzean. Bobzean described his own and Nihavitz' qualifications and experience. He then testified that the department had standard analytical procedures to determine the chemical composition of an unknown substance and that both he and Nihavitz had performed many such analyses. After listing a number of standard analytical tests and stating that all of them were used to determine the composition of the substance at issue in the case, Bobzean testified that the results of those tests indicated that the substance was 301.8 grams of 94.5% cocaine. He also testified that the report reflected that Nihavitz had followed standard procedure (II SF 216-221) and that Busbey "finished the complete examination for me" under his supervision. (*Id.* at 227.) The court therefore concludes that the state demonstrated that the report had particularized guarantees of trustworthiness and that its admission was not precluded by the Confrontation Clause.

Even if the report were not sufficiently trustworthy, its admission presented cumulative evidence. "[T]he erroneous admission of prejudicial testimony justifies habeas corpus relief only when it is material in the sense of being a crucial, critical, highly significant factor." *Andrade v. McCotter*, 805 F.2d 1190, 1193 (5th Cir. 1986) (citation omitted). The court must determine whether admission of the report was harmless error.

> [I]n assessing harmlessness, we are to look to such factors as: the importance of the testimony in the prosecution's case; whether the testimony was cumulative; the presence or absence of corroborating or contradicting evidence; the extent of cross-examination permitted; and the overall strength of the prosecution's case.

Id. at 1194.

In petitioner's case there was other evidence besides the report which indicated that the substance purchased from petitioner was cocaine. Officer DeBlanc repeatedly testified that shortly after purchasing the substance from Hunt, Hughes, and the petitioner, he performed a "field test" on it. (*See, e.g.*, II SF 33-34, 127-29.) Officer DeBlanc testified that the test indicated to him that the substance contained some amount of cocaine. (*Id.* at 33-34.) Additionally, Bobzean's testimony constitutes the opinion of an expert. That opinion testimony would have been independently admissible because a supervising chemist who is qualified as an expert may testify as to the chemical make-up of a substance by referring to the report of a subordinate chemist. *United States v. Smith*, 964 F.2d 1221, 1223 (D.C. Cir. 1992); *Reardon*, 806 F.2d at 42; *see also, United States v. Posey*, 647 F.2d 1048, 1051 (10th Cir. 1981) (under Rule 703, "[i]t is quite reasonable for a chemist to review another chemist's analysis when forming an opinion as to the veracity of the latter's test results"); *United States v. Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971), *cert. denied*, 92 S.Ct. 1168 (1972) (expert testimony based on inadmissible hearsay does not violate the Confrontation Clause). Just as in petitioner's case, in *Smith* a supervising chemist testified as to the chemical composition of cocaine purchased from a defendant. The chemist based his testimony on a report prepared by one of the chemists whom he supervised. The *Smith* court found that Fed. R. Evid. 703 allowed the chemist to testify as to the composition of the substance even though his opinion was based on inadmissible hearsay. *Id.* Similarly, in this case, Bobzean testified that he had no reason to

doubt the accuracy of the tests performed by Nihavitz and Busbey and that based on those tests and his observation of the substance in evidence, he believed the substance to be cocaine.

The court concludes that there was sufficient evidence besides the report to identify the substance. Identification of the substance as cocaine was primarily established through the expert opinion testimony of Bobzean. This fact was further corroborated by the testimony of DeBlanc wherein he testified that he had performed a field test on the substance and found that it was cocaine. The chemist's report itself was cumulative of this other evidence. Therefore, even if admission of the report were error, it was harmless.

III. Admission of Photocopy in Evidence

Petitioner next alleges that the trial court erred by admitting a photocopy of the $20.00 bill officer DeBlanc allegedly used when purchasing crack from petitioner over his counsel's best evidence rule challenge. "In reviewing state court evidentiary rulings, the federal habeas court's role 'is limited to determining whether a trial judge's error is so extreme that it constituted denial of fundamental fairness.'" *Andrade v. McCotter*, 805 F.2d 1190, 1193 (5th Cir. 1986). Habeas corpus relief is justified only where erroneously admitted evidence is "material in the sense of crucial, critical, highly significant factor." *Mattheson v. King*, 751 F.2d 1432, 1445 (5th Cir.), *cert. dismissed*, 106 S.Ct. 1798 (1985) (citation omitted). The trial court correctly held that the photocopy did not violate the best evidence rule. Petitioner does not -- and likely could not -- argue that the photocopy was anything other than an accurate reproduction of a genuine $20.00 denomination of United States currency. Accordingly, the photocopy satisfies **Tex. R. Crim. Evid**. 1003(1). Moreover, because it is undisputed that the original bill is lost, the photocopy was admissible as evidence of a lost original pursuant to **Tex. R. Crim. Evid.** 1004(1).

IV. Ineffective Assistance of Counsel

Petitioner argues that he is entitled to habeas corpus relief because his Sixth Amendment right was violated as a result of ineffective assistance of counsel. He alleges that his trial counsel erred by failing to: (1) inform petitioner of a plea bargain offer, (2) file motions, (3) conduct an investigation, (4) call witnesses, and (5) protect petitioner's confrontation rights. He alleges that his appellate counsel erred: (1) by merely copying a codefendant's brief and (2) by failing to argue that the photocopied bill had been erroneously admitted, that there was insufficient evidence to convict, or that his confrontation rights had been compromised.

A. Ineffective Assistance of Trial Counsel

The Supreme Court has established the standard for reviewing claims of ineffective assistance of trial counsel.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable . . . .

Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). Petitioner has failed to meet this standard in all of his allegations.

1. Plea Bargain Offer

Petitioner first alleges that trial counsel failed to inform him of a plea bargain offer. Petitioner's trial counsel, Alvis O.

Rogers, stated that he "was informed by Lynn McClellan, the State's Assistant Attorney that he would offer and recommend a sentence of four (4) years. I informed my client of this offer and he state [sic] that he was not guilty." Affidavit of Alvis O. Rogers, *Ex Parte Sherman*, No. 24,689-01, at 37. The state court found that Rogers' statement was true. *Id.* at 42. If a state court has held a hearing on a claim, the federal reviewing court must presume the correctness of the state court's fact findings. *Sumner v. Mata*, 101 S.Ct. 764 (1981). "Although the ultimate question of whether or not counsel's performance was deficient is a mixed question of law and fact, state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of section 2254(d)." *Loyd v. Smith*, 899 F.2d 1416, 1425 (5th Cir. 1990). Because the court must conclude that counsel informed petitioner of the existence of a plea bargain, petitioner has failed to demonstrate that counsel erred.

2. Motions

Petitioner alleges that counsel should have filed pretrial motions. Rogers stated that he informed petitioner that no pretrial motions were required to obtain discovery because the prosecution made its files accessible to Rogers. Rogers Affidavit, *Ex Parte Sherman*, No. 24,689-01, at 37-38 ("I had access to all of the files and information from the District Attorney's office[, and] . . . a list of all state's witnesses . . . .").[4]

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[4] Although Rogers also alleges that he submitted all pretrial motions that petitioner prepared, *id.* at 38, petitioner denies having prepared any motions, and the record contains no evidence of pretrial motions prepared by petitioner. The court pauses to note that hybrid representation, in which counsel and client share responsibility for making strategy decisions or submitting materials for court review, is not permissible. *United States v. Daniels*, 572 F.2d 535, 540 (5th Cir. 1978), and *Landers v. State*, 550 S.W.2d 272, 280 (Tex. Crim. App. 1977), are clear statements that neither the United States nor Texas Constitutions require, and neither the Fifth Circuit nor Texas courts condone, the practice of hybrid representation. *See also Satterwhite v. Lynaugh*, 886 F.2d 90, 92-93 (5th Cir. 1989) (holding

Petitioner does not identify any specific motion that counsel should have filed, nor does he allege any specific harm that resulted from counsel's failure to file pretrial motions. Petitioner has not carried his burden under the *Strickland* standard.

3. Investigation

Petitioner alleges that counsel failed to sufficiently investigate the facts of the case. The Sixth Amendment requires counsel "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 104 S.Ct. at 2066. "A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed . . . ." *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989).

Petitioner's defense was predicated on his wife's testimony that he was an innocent bystander who was mistakenly arrested during a police raid. According to his wife, petitioner was merely asking a gathering of persons for information about an area resident who owed him money when the police arrived to arrest the persons whom officer DeBlanc described to them. Petitioner argues that trial counsel failed to interview the state's witnesses and also failed to investigate leads concerning the relatives of his codefendants who could have testified that neither Hunt nor Hughes knew petitioner. Petitioner argues that by corroborating his wife's testimony that petitioner was

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that petitioner failed to exhaust state remedies because his claim had never been "fairly presented" to the state's highest court when only presentation occurred in brief filed *pro se* in pursuit of hybrid representation); *Rudd v. State*, 616 S.W.2d 623, 625 (Tex. Crim. App. 1981) (Since "[t]here is no right to hybrid representation," *pro se* briefs filed by represented appellants "present nothing for review" and will only be examined for "errors that should be considered in the interest of justice.").

unacquainted with either Hunt or Hughes, these witnesses would have provided additional evidence tending to prove that petitioner was not involved in a drug transaction with those two.

In his affidavit petitioner's trial counsel states that

> I informed Mr. Sherman that I interview [sic] certain witnesses, but they were not good witness [sic] on his behalf. That I would try to get some type of statement if possible, then I will talk to them on the day of the trial to see if they have; are [sic] will try to change their prior statements made to me. I found no state witness in his favor nor were there any other witness [sic] except his wife and the co-defendants . . . .

Rogers Affidavit, *Ex Parte Sherman*, No. 24,689-01, at 37-38. Because the court must once again defer to the state court's factual findings, the court concludes that Rogers did investigate the fact of petitioner's case, and, in light of the statements of potential witnesses, counsel determined that further investigation would be fruitless. Under the circumstances this decision cannot be gainsaid as unreasonable. Furthermore, because petitioner relies solely upon his own conclusory allegations to show that counsel would have collected additional evidence had he continued his investigation, the court also concludes that he has failed to present any evidence[5] that counsel's investigation was unreasonable.

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[5] "Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue on his *pro se* petition . . . unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value." *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983).

4. Witnesses

Petitioner alleges that counsel failed to subpoena Carl Hughes as a witness. Petitioner contends that Hughes informed counsel that he did not know petitioner and that petitioner was not involved in dealing controlled substances. He further contends that, if subpoenaed, Hughes would have testified to that effect. "[T]he presentation of witness testimony is essentially strategy and thus within the trial counsel's domain." *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985). To prove that counsel was ineffective for failing to call a witness petitioner must identify the uncalled witness and the subject matter of his potential testimony. *Id.* Petitioner must show not only that he was prejudiced by the lack of testimony, but that the witness would have indeed testified. *Boyd v. Estelle*, 661 F.2d 388, 390 (5th Cir. 1981). Petitioner has presented no evidence that Hughes would have testified voluntarily or that if subpoenaed he would have testified as petitioner now contends. Rather, the only record evidence is that provided by petitioner's counsel: "I found no state witness in [petitioners'] favor nor were there any other witness [sic] except his wife and the co-defendants . . . ." Counsel was well aware of Hughes and must have known what Hughes would say if called. Absent evidence that Hughes would have provided evidence undermining DeBlanc's eyewitness testimony, the court must conclude that counsel's decision not to call Hughes was sound trial strategy. Petitioner has failed to demonstrate that counsel was ineffective for failing to call Hughes as a witness.

5. Right to Confront Witnesses

Petitioner next alleges that counsel failed to protect petitioner's right to confront witnesses by allowing the chemical analysis report to be admitted in evidence. The court has already concluded that petitioner's confrontation rights were not violated by admission of this evidence. Accordingly, counsel was not ineffective for failing to raise this issue at petitioner's trial. Moreover, counsel was not ineffective for failing to object

to this evidence as inadmissible hearsay because the admissibility under the Texas Rules of Criminal Evidence of chemist's reports was unsettled when petitioner was convicted. *Compare Hayden v. State*, 753 S.W.2d 461 (Tex. App. -- Beaumont 1988, no pet.) (laboratory report from the Texas Department of Public Safety was admissible through the testimony of the supervising chemist); *Armijo v. State*, 751 S.W.2d 950 (Tex. App.-- Amarillo 1988, no pet.) (chemical analysis report on LSD content was sufficiently trustworthy to be admissible through the testimony of the supervising chemist); and *Cole v. State*, 735 S.W.2d 686 (Tex. App. -- Amarillo 1987), *rev'd*, 839 S.W.2d 798 (Tex. Crim. App. 1990) (report prepared by absent Department of Public Safety chemist was admissible through testimony of supervising chemist), *with Bermen v. State*, 798 S.W.2d 8 (Tex. App. -- Houston [1st Dist.] 1990), *pet. dism'd, improvidently granted sub nom. Hendricks v. State*, 817 S.W.2d 86 (Tex. Crim. App. 1991) (decision rendered six days after petitioner's trial holding that a chemist's report is not admissible in view of Texas' adoption of Rule 803(8)(B). It was not until the Texas Court of Criminal Appeals issued its opinion on rehearing in *Cole v. State*, 839 S.W.2d 798 (Tex. Crim. App. 1990) (1986 adoption of new Texas Rules of Criminal Evidence precluded application of former Texas cases holding that chemist's reports were admissible), on October 21, 1992, that this question became settled.[6]

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[6] Petitioner's reliance upon *United States v. Cain*, 615 F.2d 380 (5th Cir. 1980), is misplaced for two reasons. First, the Fifth Circuit has not determined whether a police chemist's report is more like the escape report held inadmissible in *Cain* or the deportation warrant held admissible in *United States v. Quezada*, 754 F.2d 1190 (5th Cir. 1985). Moreover, although the Texas Court of Criminal Appeals ultimately concluded in *Cole* that Texas Rules of Criminal Evidence 803(6) & (8) should be interpreted *in pari materia* with their federal counterparts, and that *Cain* should be interpreted to mean that the Fifth Circuit would find a police chemist's report inadmissible, that decision was not final until the Court of Criminal Appeals issued its opinion on rehearing in 1992. In the interim, some lower Texas courts continued to apply former cases holding that these reports were admissible.

The Sixth Amendment only requires reasonably effective counsel. "Effective assistance is neither tantamount to errorless assistance, nor counsel judged ineffective by hindsight." *Nelson v. Estelle*, 642 F.2d 903, 906 (5th Cir. 1981). Because counsel could reasonably have believed that the report was admissible at the time of petitioner's trial, counsel's failure to object cannot be viewed as an "error[] so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 104 S.Ct. at 2064.

B. Ineffective Appellant Counsel

A defendant is entitled to assistance of counsel on a first appeal whenever a state permits a first appeal as of right. *Evitts v. Lucey*, 105 S.Ct. 830, 836 (1985). Texas provides petitioner with a first appeal and with counsel for that appeal. When a federal court reviews the effectiveness of appellate counsel it applies the same standard applied to trial counsel. *See, e.g., Hamilton v. McCotter*, 772 F.2d 171, 181-82 (5th Cir. 1985); *Schwander v. Blackburn*, 750 F.2d 494, 501-02 (5th Cir. 1985) (both holding that *Strickland* provides the appropriate standard to review effectiveness of appellate counsel).

1. Appellate Brief

Although petitioner alleges that his appellate counsel was ineffective for filing essentially a slightly modified version of the brief filed on behalf of his codefendant, he has failed to explain how his counsel committed any error doing so. Moreover, petitioner has failed to allege or demonstrate how his counsel's choice prejudiced him in any way. Accordingly, petitioner's challenge to appellate counsel's performance fails to meet the requirements of the *Strickland* test.

2. Points of Error

Petitioner also alleges that his appellate counsel was ineffective because he failed to raise a number of potentially

meritorious claims. Appellate counsel has no constitutional duty to raise all nonfrivolous arguments on appeal. *Jones v. Barnes*, 103 S.Ct. 3308, 3314 (1983) ("For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . ."). "A brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." *Id.* at 3313 (citation omitted). Appellate counsel for petitioner challenged one point of error on appeal.[7] Because the other claims that petitioner has sought to press are without merit, the court has no cause to second-guess counsel's professional judgment in raising the single point of error.

VI. Conclusion

Because none of the items listed in petitioner's Petition for Discovery Subpoena Duces Tecum (Docket Entry No. 4) not already supplied to petitioner[8] comply with the requirements of

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[7] Counsel argued that the trial court had committed reversible error in denying petitioner's motion when the state presented questionable reasons for its exercise of peremptory challenges against black members of the jury panel.

[8] Pursuant to 28 U.S.C. § 2250, on September 23, 1994, the court ordered the clerk to forward copies of petitioner's state court records to petitioner. (Docket Entry No. 16) Respondent, relying on authority upholding 28 U.S.C. § 753(f)'s scheme regulating when a court may order that the United States pay the fees charged by court reporters appointed by district courts pursuant to § 753(a), objects to the court's September 23, 1994, Order. Respondent has fundamentally misinterpreted § 753(f). Because § 753(f) only controls a court's ability to expend government funds to pay a court reporter, it does not affect a court's ability to order the clerk to forward copies of records already contained in the clerk's files pursuant to § 2250. Moreover, § 753(f) does not restrict a court's ability to pay for transcripts for federal or state prisoners proceeding *in forma pauperis* while pursuing habeas corpus relief pursuant to 28 U.S.C. § 2241 or § 2254.

> Fees for transcripts furnished in criminal proceedings to persons proceeding under the Criminal Justice Act . . . or in habeas corpus

Fed. R. Civ. P. 26(b)(1), petitioner's request for discovery of those items is **DENIED**. Because Petitioner has failed to demonstrate that Texas is holding him in custody in violation of the Constitution or a law or treaty of the United States, Respondent Scott's Motion for Summary Judgment (Docket Entry No. 12) is **GRANTED.**

SIGNED at Houston, Texas, on this 8th day of November, 1994.

SIM LAKE
UNITED STATES DISTRICT JUDGE

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proceedings to persons allowed to sue . . . in forma pauperis, shall be paid by the United States out of moneys appropriated for those purposes.

Finally, while § 753(f) does restrict a court's ability to order transcripts for indigent federal prisoners pursuing reduction of sentence pursuant to 28 U.S.C. § 2255, a court may still order transcripts for such persons "if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal." Accordingly, Respondent's Objection to the Court's Partial Grant of Discovery (Docket Entry No. 17) is **OVERRULED.**

Additionally, although respondent insists that the court is now in possession of two copies of petitioner's state habeas writ records, a careful examination of the records submitted to the clerk indicate that the respondent's original submission contained an extraneous copy of the transcript in *State v. Robert Earl Hunt,* No. 533036 -- petitioner's codefendant -- and did not contain a copy of petitioner's state habeas records. The court is aware that errors such as this occur, and will extend respondent the benefit of the doubt that respondent intended to comply with the court's order. Accordingly, because the clerk is now in possession of a copy of petitioner's state habeas records, the clerk is **ORDERED** to forward a copy of those records to petitioner.